UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PRINCE BRELAND, ANNIE COLEMAN and MAXIME DIATTA, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

GEOFFREY ZAKARIAN, COUNTRY IN NEW YORK, LLC, ADAM BLOCK, 3SIXTY HOSPITALITY, LLC and MOSHA LAX,

Defendants.

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08cv6120 (DF)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

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Class Representatives Prince Breland, Annie Coleman and Maxime Diatta ("Class Representatives"), on behalf of themselves and others similarly situated (the "Class"), submit this Memorandum of Law, the accompanying Declaration of Scott A. Lucas dated June 4, 2012 ("Lucas Declaration"), and the accompanying exhibits, in support of their motion pursuant to Fed. R. Civ. P. Rule 23(e) for final approval of a proposed settlement in this wage and hour class and collective action, which was previously certified by Judge Kaplan as a class action pursuant to Fed. R. Civ. P. Rule 23(b)(3) (hereafter, the "Wage Action").

I. INTRODUCTION

On July 3, 2008 Class Representatives filed a wage action on behalf of themselves and a putative class of similarly-situated cooks who worked at Country, primarily alleging that the above-named Defendants committed various wage and hour violations under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA") and New York Labor Law ("NYLL") §§ 663.1, 193 and 198.1-a and § 142-2.2 of Title 12 of the Compilation of Codes Rules & Regulations of the State of New York ("NYCRR"). The Class Representatives alleged that the cooks who worked at Country were not paid for much of the overtime pay to which they were entitled, and that unauthorized deductions were taken from their paychecks for "meals" that were not even provided.

Previously the Court (Kaplan, J.) approved a final partial settlement which, in exchange for settlement payments totaling $200,000, resolved the claims against all the defendants *except for* Geoffrey Zakarian ("Zakarian"). The terms of that partial settlement have been fully effectuated, except for the disposition of unclaimed funds from that settlement (which are due to be re-distributed shortly).

Plaintiffs have now agreed to settle with Zakarian for an additional $200,000 in settlement funds (bringing to $400,000 the total amount secured in settlement funds in this case) (hereafter, the "Settlement").

The Court preliminary approved the Settlement on March 1, 2012, stating:

> PRELIMINARY APPROVAL ORDER: The proposed settlement set forth in the Joint Stipulation of Settlement appears to be fair, reasonable, and adequate and is preliminarily approved. The Class consists of all prep and line cooks who worked at Country in New York, LLC ("Country") between September 1, 2005 and June 30, 2008, excluding those cooks who worked two pay periods or less. The Settlement Administrator shall take all reasonable steps to obtain the correct address of any Class Members for whom the notice is returned by the post office as undeliverable and shall promptly attempt one remailing for each class member whose notice is returned as undeliverable and for each class member who requests that the Settlement Notice be remailed. A Final Approval Hearing shall be held in Courtroom 12D, United States Courthouse, 500 Pearl Street, New York, New York at 2:30 p.m. on June 21, 2012 to determine whether the settlement should be approved by the Court as fair, reasonable and adequate pursuant to Fed. R. Civ. P. Rule 23(e)(2), and whether the Court should authorize the above-referenced distribution of the above-referenced Settlement Funds. [See docket entry # 210]

Since then, the Class Notice has been mailed to the class members, and there have been no objections or opt-outs.

A copy of the Joint Stipulation of Settlement is attached as Exhibit "A" to the Lucas Declaration.

The proposed settlement and the procedures for its implementation are fair, reasonable and adequate under Fed. R. Civ. P. Rule 23(e) and the governing standards for evaluating class action settlements in this Circuit.

II. BACKGROUND

As discussed in the Lucas Declaration, this case has involved four dispositive motions, a sharply contested motion for class certification, considerable discovery-related activity, a court-sponsored mediation, several changes of counsel among the various defendants, and the actual or near insolvency of each of the various defendants.

The original Rule 23 Class was certified by the Court on July 30, 2009. *See* docket # 89, 90. It consisted of all persons who worked as "prep" and line cooks at Country in New York between September 2005 and the date of final judgment in this matter (hereafter, the "Original Rule 23 Class"). There were 161 members of the Original Rule 23 Class.

Since the Class Representatives and Class Counsel were unaware of substantial post-filing wage and hour violations at Country, it was agreed that the definition of the class should be modified by deleting the phrase "the date of final judgment in this matter" and substituting it with "July 2, 2008" (which, for all practical purposes, results in a damages cutoff date of June 30, 2008 since that is the date of the last pay period ending prior to the filing of the Complaint). *See* Lucas Decl. Ex. "A" at ¶ 7.

Accordingly, the definition of the Class was amended to consist of all persons who worked as prep and line cooks at Country in New York from September 1, 2005 through June 30, 2008 (hereafter, the "Amended Rule 23 Class"). Under this definition of the Class, there are 153 members of the Class, of which 28 are ineligible to recover a share of the settlement proceeds because they only worked two pay periods or less. *See*

Lucas Declaration, Exhs. "E" and "F" (Declarations of Gregory Emmert) and the spreadsheet annexed as Exhibit A to the Joint Stipulation of Settlement.

The Class Certification Motion

On October 10, 2008, Plaintiffs filed a motion pursuant to Fed. R. Civ. P. Rule 23 to certify the Wage Action as a class action for a class consisting of all prep and line cook who worked at Country since September 1, 2005.

Plaintiffs' motion also included a request pursuant to 29 U.S.C. § 216(b) to compel the production of the names and contact information of all prep and line cook who worked at Country since September 1, 2005 and to authorize the mailing of a notice to those cooks informing them of their right to opt-in to the Collective Action Claims asserted in Plaintiffs' First Cause of Action.

Defendants opposed the motion.

On November 24, 2008, the Court "so ordered" a stipulation tolling the statute of limitations with respect to putative class members' FLSA claims during the pendency of the motion for class certification.

On July 30, 2009, the Court granted Plaintiffs' motion to the extent of: **(A)** certifying Plaintiffs' Second and Fourth Causes of Action as a Rule 23 class action, except to the extent Plaintiffs' Fourth Cause of Action challenged allegedly unlawful tax deductions, and **(B)** certifying Plaintiffs' First Cause of Action as a collective action pursuant to 29 U.S.C. § 216(b). *See* docket # 89 and 90.

On September 17, 2009, the Court entered an Endorsed Letter approving as to form, with certain changes, the proposed notice to class members of their right to participate in the Collective Action Claims (hereafter, the "Opt-In Notice").

The Dispositive Motions

On October 20, 2008, 3Sixty filed a motion to dismiss, which was denied by order dated June 30, 2009.

On November 25, 2008, Defendants filed a motion to dismiss Plaintiffs' Third Cause of Action for untimely payment of wages in violation of the FLSA, which was granted by order dated June 30, 2009.

On December 16, 2009, Lax filed a motion to dismiss, which was denied by order dated January 22, 2010.

On December 7, 2010 Plaintiffs moved for summary judgment (or, in the alternative, a default judgment) against Zakarian. The Court granted Plaintiffs' motion for a default judgment and set the matter down for a class action inquest on damages, and denied without prejudice Plaintiffs' motion for summary judgment.

The Opt-In Process

On or about October 1, 2009, Country's first successor counsel provided me with what was represented to be a complete list of all prep and line cooks who worked for Country since September 1, 2005.

Thereafter the court-approved notices were mailed to class members. A total of 37 signed consents were returned and filed with the Court.

III. SUMMARY OF SETTLEMENT TERMS

The Settlement Agreement funds are allocated as follows: **(A)** $156,158.44 (consisting of $145,000 from Zakarian, and an additional $11,158.44 in undistributed funds from the earlier settlement with Moshe Lax and Country in New York, LLC) will be allocated to Class Members as set forth in Ex. B to the accompanying Declaration of Scott A. Lucas; **(B)** approximately $47,000 will be paid to Class Counsel as attorney's fees (in accordance with the payment scheduled contained in the Settlement Agreement), provided that while not an employer of any Class Member, Class Counsel will nonetheless advance the employer's share of payroll taxes on the wage payments referenced in the Settlement Agreement, subject to Class Counsel's later recoupment of same from any unclaimed settlement funds (*i.e.*, from settlement checks that are never cashed); and **(C)** approximately $8,000 will be paid to the Settlement Administrator (Rust Consulting, Inc.) for the costs of administering this settlement, provided that Class Counsel will be responsible for paying any costs of the Settlement Administrator that exceed $8,000.

The Settlement Administrator will be exclusively responsible for the delivery of the settlement checks to each Class Member within 30 days of the date the Final Order and Judgment is entered. One-half (50%) of the Settlement Administrator's payments to Class Members pursuant to the Settlement Agreement shall be treated as wages and the other half (50%) shall be treated as liquidated damages.

The settlement payments due under the Agreement have been structured so that the class members will be paid up front and Class Counsel's attorney's fees will be paid from the back end payments.

IV. CLASS ACTION SETTLEMENT PROCEDURES

Fed. R. Civ. P. 23 governs class action suits, including the settlement of class actions. Under Rule 23, court approval is required for a class-wide settlement: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class." Fed. R. Civ. P. 23(e)(1)(A).

"The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1)(B). Rule 23 requires that the parties seeking approval of a settlement under Rule 23(e)(1) "file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(2).

The first step in the settlement process (preliminary approval) has already been taken. The Class Notices have been mailed to the class members, and any required re-mailings have taken place as well. None of the class members has opted out. None of the class members has objected. All that remains is final approval and distribution of the settlement funds.

V. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE

Courts favor settlement particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *2 Newberg § 11.41*. The Settlement furthers these goals.

Rule 23(e)(1)(C) requires that a class settlement be "fair, adequate, and reasonable". Fed. R. Civ. P. 23(e)(1)(C). In assessing procedural fairness, courts consider "whether the negotiations were a result of 'arm's length negotiations' and whether Class Counsel possessed the experience and ability to represent effectively the class's interests." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Courts in this circuit review a proposed settlement agreement for substantive fairness according to the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), namely: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Each factor will be addressed in turn below.

Before doing so, however, it must first be stressed that the factors considered by the court ought not be rigidly applied; rather, "the evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations and rough justice." *Grinnell Corp.*, 495 F.2d at 468 (citation omitted).

Moreover, when weighing the factors in connection with a request for preliminary approval of a settlement, the Court should direct notice to the class and a fairness hearing unless "obvious deficiencies" in the proposed settlement place it outside the "range of possible approval." *In re State Street Bank and Trust Co. ERISA Litig.*, 2009 WL 3458705 *1 (S.D.N.Y. 2009) (citations omitted). Weighed against applicable legal standards, the proposed Settlement falls easily within the range of possible approval.

A. Procedural Fairness

1. The Settlement is the Product of Bargaining in Good Faith.

To assess procedural fairness, courts consider whether the settlement was the product of "arm's length" negotiations rather than the result of collusion. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (citing *Grinnell*, *supra*, 495 F.2d at 463-66).

The settlement did not occur early on, but rather after more than three years of difficult litigation. Moreover, the settlement occurred after extensive negotiations with Zakarian's personal attorney followed. Lucas Declaration, ¶ 70.

There are no facts or circumstances to suggest that the settlement was tainted by any hint of collusion.

2. Opinion of Experienced Counsel.

Another factor "in determining the fairness of the settlement is the opinion of counsel involved in the settlement." *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308

(S.D.N.Y. 1972) (opinion of counsel should be given "great weight" in evaluating class settlement). Class Counsel is highly experienced in wage and hour litigation, including complex multi-party litigations in the restaurant industry. Class Counsel has been previously certified as class counsel, and has successfully litigated what is now the leading case under New York's tip appropriation law, Labor Law § 196-d, *Samiento, et al. v. World Yacht, Inc., et al.*, 10 N.Y.3d 70 (2008). Based on Class Counsel's extensive experience in restaurant industry litigation (including other restaurant industry class actions) and his thorough familiarity with the factual and legal issues in this case, he has reached the firm conclusion that the proposed settlement is clearly in the best interests of the class.

B. Substantive Fairness

1. The Complexity, Expense and Likely Duration of The Litigation

To assess substantive fairness, courts first consider the complexity, expense and likely duration of the litigation. Courts consider the time needed to complete discovery, the length of a potential trial, the complexity of the issues in the case, and the costs of continuing litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d96, 118 (2d Cir. 2005).

The complexity, expense and likely duration of continuing litigation in this case favor approval of the proposed Settlement. This factor clearly weighs in favor of the settlement because there is substantial uncertainty as to whether the Bankruptcy Court would exempt from discharge a judgment obtained by default following Zakarian's failure to answer the Amended Complaint. For such a judgment to be exempt from discharge, Plaintiffs would have to establish to the satisfaction of the Bankruptcy Court:

(a) that the issues in the case were *actually litigated* for collateral estoppel purposes, including the issue of whether Zakarian's violations were "willful" under the former versions of NYLL §§ 663.1 and 198.1-a, despite the fact that the §§ 663.1 and 198.1-a claims for a 25% penalty for "willful" violations of the NYLL were not asserted against Zakarian at any time prior to the filing of the Amended Complaint that Zakarian failed to answer (because such claims were not maintainable in the context of a class action until the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010)); and **(b)** that the "willfulness" requirement of the former versions of NYLL §§ 663.1 and 198.1-a meet the "willful and malicious" injury test for exempting claims from bankruptcy under 11 U.S.C. § 523(a)(6) -- an issue which, to my knowledge, has never been decided.

Moreover, even if a money judgment were obtained against Zakarian and later found by the Bankruptcy Court to be legally enforceable, such a judgment would likely be unenforceable as a practical matter because Zakarian is not known to have any meaningful assets.

2. The Reaction of the Class To the Settlement

Second, courts consider the class reaction to the settlement. The expressed views of class members are important to the Court's inquiry. In evaluating the degree of support for or opposition to a settlement by class members courts have looked to the proportion of the class who formally object to the fairness and adequacy of the settlement, and the proportion of those who opt-out of the settlement. Where relatively few class members opt out or object, the lack of opposition supports approval of the settlement. *In re Air*

Cargo Shipping Services Antitrust Litig., 2009 WL 307796 (E.D.N.Y. 2009). This factor strongly favors the Settlement, as none of the class members has objected or opted out.

3. The Stage of the Proceedings and Amount of Discovery Completed

Third, courts consider the current stage of the proceedings and the amount of discovery completed. The parties need not have engaged in extensive discovery to have a proposed settlement approved. *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 176 (S.D.N.Y. 2000). Courts will give approval where Class Representatives have conducted sufficient discovery to have a thorough understanding of their case and have diligently investigated the facts supporting their claims. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005).

The settlement was entered into following more than three years of (often contentious) discovery. Discovery has long been closed. While Plaintiffs were less than satisfied with the quality of much of the discovery provided and were hampered by the destruction of Country's electronically-stored time-keeping information shortly after this case was filed, no amount of additional discovery would bring back Country's lost and destroyed records. Moreover, Plaintiffs were able to surmount some of the discovery-related obstacles they faced by: **(A)** obtaining, via subpoena, all of the payroll records for class members from third-party payroll processers (Paychex and ADP); and **(B)** engaging in an exhaustive analysis of the available records produced by Defendants, Paychex and ADP. *See generally* the accompanying Emmert Declarations dated December 28, 2010 and December 7, 2010 (Lucas Declaration, Exhs. "E" and "G").

Coupled with Declarations supplied by Class members, the exhaustive analysis of the available records produced by Defendants, Paychex and ADP has enabled Class Counsel to gain an in-depth understanding of the likely scope of Defendants' potential liability and the potential class-wide damages.

Because Class Counsel entered into the proposed Settlement with a thorough understanding of their case, settlement at this stage of litigation is appropriate.

4. The Risks of Establishing Liability

Fourth, courts consider the risks of establishing defendants' liability. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005). Class Representatives obtained a default judgment against Zakarian. However, as discussed about, any money judgment that may be obtained following a class action inquest on damages would likely be unenforceable as a practical matter (and also possible as a legal matter).

5. The Risks of Establishing Damages

Fifth, courts consider the risks of establishing damages. Regardless of Class Representatives' ability to establish liability, they still face the "substantial risks in proving [their] damages at trial." *In re Painewebber Ltd. Pshps. Litig.*, 171 F.R.D. 104, 128 (S.D.N.Y.), *aff'd* 117 F.3d 721 (2d Cir. 1997). Plaintiffs believe they can establish and have established damages with the requisite level of certainty. However, Zakarian could challenge the assumptions underlying Plaintiffs' damages estimates, and, as discussed, even if substantial damages were awarded, Plaintiffs would probably be unable to enforce the judgment.

6. The Risks of Maintaining the Class Action Through The Trial

Sixth, courts consider the risks of maintaining the class action through trial. Class Representatives would likely be able to maintain the class through a class action inquest on damages. However, keeping track of class members, especially former employees, will become more difficult over time (i.e., through the inquest and what would likely be an extensive period of post-judgment litigation in Bankruptcy Court), especially since the class consists of relatively low-wage workers who, due to economic circumstances, are more likely to move with greater frequency than persons with greater economic resources.

7. The Ability of the Defendants To Withstand A Greater Judgment

Courts also consider the Defendants' ability to withstand greater judgment. *Wal-Mart Stores, Inc.*, supra, 396 F.3d at 119. This factor also weighs in favor of settlement because Zakarian is unable to withstand a greater judgment (or, indeed, any judgment at all – the bulk of the settlement funds are apparently being provided by Mr. Zakarian's father-in-law).

8. The Range Of Reasonableness of the Settlement Fund In Light Of the Best Possible Recovery

Courts measure the settlement terms against the "best possible recovery for Class Representatives." *Grinnell*, *supra*, 495 F.2d at 465. The "best possible recovery" must be gauged in light of Zakarian's financial condition. Zakarian would be unable to pay a judgment even if he were found liable, and has evidently secured the bulk of the settlement funds from his father-in-law.

9. The Range Of Reasonableness of the Settlement Fund To A Possible Recovery In Light of All the Attendant Risks of Litigation

Finally, "[i]n deciding whether to approve a proposed class settlement, the most significant factor for the district court is the strength of the claimants' case balanced against the settlement offer." *Schneider v. GE Capital Mortgage Services, Inc.*, 1997 WL 272403 *7 (S.D.N.Y. 1997) (quotation omitted). While Class Representatives might recover more than $200,000 at an inquest, there are significant risks, including the probability that any judgment against Zakarian would be incapable of being enforced. With the Court's approval, the above-referenced settlement funds will be distributed among the Class Members based on the proportional value of each class member's claim.

The benefits to the class of the settlement are clear when this monetary relief is weighed against the potential obstacles and the likely inability to recover *anything* from Zakarian.

C. Compensation for Class Counsel is Appropriate

A final consideration as to the overall reasonableness of the settlement is whether the payments made to Class Counsel are appropriate and reasonable.

Class Counsel has spent well over 1,200 hours to date investigating and litigating this case. See Lucas Declaration Ex. "B" (detailed and contemporaneously-maintained breakdown of the first 876 hours of time expended on this matter). Compensation of approximately $47,000 for Class Counsel would only represent a very small fraction of what Class Counsel would receive if Zakarian were solvent. Accordingly, the award for attorney's fees is reasonable.

CONCLUSION

Class Representatives have provided substantial support for the conclusion that the Settlement was the product of good-faith bargaining between the parties; that Class Counsel is experienced in the type of litigation at issue; that Class Counsel's judgment that the Settlement is in the best interests of the class is entitled to substantial weight; that the magnitude of the Settlement is reasonable in light of the uncertainty of establishing liability and damages, the time and expense of continued litigation, and the risk of collecting a final judgment. No class member has objected. No class member has opted out.

WHEREFORE, Class Representatives respectfully request that the Court enter an Order finally approving the Settlement.

Dated: New York, New York
June 4, 2012

LAW OFFICES OF SCOTT A. LUCAS

By__________/s/________________________

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